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KERALA GAZETTE

EXTRAORDINARY

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ELECTION COMMISSION, INDIA

NEW DELHI,

Dated the 9th May, 1958/Vaisakha 19, 1880 (Saka)

NOTIFICATION

No. 82/261/57/5859.

In continuation of Election Commission's notification No. 82/261/57 dated the 15th October, 1957, published in the Kerala Gazette Extraordinary (Vol. II, No. 114) dated the 21st October, 1957, under section 106 of the Representation of the People Act, 1951 (43 of 1951) the Election Commission hereby publishes the Judgment of the High Court of Kerala, Ernakulam, delivered on the 28th March, 1958, on the appeal filed by Sbri Othayoth Gopalan, son of Raman, Puzhathu Amsom, Chalat Desom, Cannanore District, against the order dated the 16th September 1957, of the Election Tribunal, Tellicherry in Election Petition No. 261 of 1957.

By order,

DIN DAYAL,

Under Secretary to the Election Commission.

IN THE HIGH COURT OF KERALA, ERNAKULAM.

Friday, the 28th day of March, One Thousand Nine Hundred and Fifty Eight.

Present:

The Hon'ble Mr. K. T. Koshi, Chief Justice,
And
The Hon'ble Mr. Justice M. S. Menon.

ELECTION APPEAL No. 1 OF 1957.

Election Petition No. 261/57 of the Election Tribunal, Tellicherry.

Sri Othayoth Gopalan, Puzhethu Amsom, Chalat Desom, Cannanore District. } *Appellant Petitioner.*

By Advocates Messrs. P. Govinda Menon,
T. Narayanan Nambiar,
T. Karunakaran Nambiar.

1. Sri Kannan, Chaliyoth, Communist Party Office, Cannanore. — *Respondents.*

2. Sri Chovvakkaran Parakkat Kunhalikutty Keyi, Parappanangadi Amsom, Parappanangadi Post, Kozhikode District. — *Respondents.*

By Advocates Messrs. K. Kunjirama Menon,
N. Gangadhara Menon.

This Appeal having been finally heard on 8-1-58, the Court on 28-3-1958 delivered the following:—

JUDGMENT.

This is an appeal by the petitioner in Election Petition No. 261 of 1957. His petition to set aside the election of the 1st respondent to the Kerala State Assembly from the Cannanore Assembly Constituency No. 1 was dismissed by the Election Tribunal, Tellicherry, by its order dated the 16th September 1957. It is the correctness of that order that is challenged by this appeal under section 116A of the Representation of the People Act, 1951.

2. There were three contesting candidates, the petitioner (Congress), the 1st respondent (Communist) and the 2nd respondent (Independent). The polling was on the 5th March 1957, and the counting of votes, on the 9th and the 11th March 1957. The 1st respondent secured 17,464 votes, the petitioner, 17,413 votes, and the 2nd respondent, 9082 votes. The result of the election was declared on the 11th March 1957,

3. Section 100 of the Representation of the People Act, 1951, details the grounds for declaring an election to be void. There are two sub-sections to that section and sub-section (1) is subject to the provisions of sub-section (2). According to sub-section (1) (d) of that section if the Tribunal is of opinion "that the result of the election, in so far as it concerns a returned candidate, has been materially affected—

(i) by the improper acceptance of any nomination, or

(ii) by any corrupt practice committed in the interests of the returned candidate by a person other than that candidate or his election agent or a person acting with the consent of such candidate or election agent, or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act",

the Tribunal shall declare the election of the returned candidate to be void, and the contention of the appellant is that the Tribunal was wrong in refusing such a declaration.

4. Before the Tribunal the prayer was not merely for a declaration that the election of the 1st respondent was void but also for a declaration that the petitioner has been duly elected. The prayer for a declaration that the petitioner has been duly elected is not pressed before us.

5. The petitioner examined 85 witnesses before the Tribunal and Exhibits A1 to A 86 were marked as his Exhibits. Nine witnesses were examined on behalf of the 1st respondent and one, the Returning Officer, was summoned and examined by the Tribunal.

6. The 2nd respondent remained *ex parte* throughout the proceedings before the Tribunal. He has also not chosen to enter an appearance before us.

7. The contentions urged on behalf of the appellant are—

(1) that 23 persons who voted at the election in favour of the 1st respondent were less than 21 years of age on the qualifying date, namely, the 1st March 1956;

(2) that the appellant lost over a 100 votes at Polling Booth Nos. 78 and 79 as a result of the polling commencing late at the said booths and closing earlier than promised by the Presiding Officer;

(3) that the appellant lost 23 votes as the result of a wrong refusal of postal ballot papers by the Returning Officer;

(4) that the appellant lost 8 votes as a result of obstruction by the Communists; and

(5) that the incidents above-mentioned have materially affected the result of the election.

8. *Contention No 1.*

Article 326 of the Constitution provides:

> "The election to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than twenty-one years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice shall be entitled to be registered as a voter at any such election".

Part III of the Representation of the People Act, 1950, consisting of sections 14 to 24, deals with the Electoral Rolls for Assembly and Electoral College Constituencies. Section 19 of the Act reads as follows :—

> "Subject to the foregoing provisions of this Part, Every person who, on the qualifying date—
>
> (*a*) is not less than 21 years of age, and
>
> (*b*) is ordinarily resident in a constituency,
>
> shall be entitled to be registered in the electoral roll for that constituency".

The expression "qualifying date" is defined in section 14(b). The definition is —

> "qualifying date", in relation to the preparation or revision of every electoral roll under this Part, means that 1st day of March of the year in which it is so prepared or revised".

It is agreed that the qualifying date with which we are concerned is the 1st March 1956.

9. The Electoral Rolls in which according to the appellant the names of minors have been included are —

> "Exts. A1, A2, A22, A28, A32, A39 and A42";

and the 23 minors who according to him voted at the election for the 1st respondent are :

> "Nos. 33, 10957, 10988, 11457, 11466, 11477, 11506, 11675, 11676, 11677, 11680 and 11682 of Ext. A1 ;
>
> No. 5754 of Ext. A2 ;
>
> Nos. 2765 and 2781 of Ext. A22 ;
>
> Nos. 2121 and 2144 of Ext. A28 ;
>
> Nos. 1681, 3252, 5516 and 5563 of Ext. A32 ;
>
> No. 1720 of Ext. A39 ; and
>
> No. 5762 of Ext. A42".

According to the Tribunal only two minors have been proved to have voted at the election, namely, No. 33 of Ext. A1 (P. W. 2)

and No. 2,765 of Ext. A22 (P. W. 11). The appellant's Contention is that the other 21 voters also should have been included in that category.

10. The exhibits on which reliance is placed to establish the minority of the 23 voters are the following Admission Registers maintained by the Schools in which they are alleged to have studied:

"A6 to A16, A19, A21, A27, A30, A31, A33, A40, A41, A44 and A64 to A66".

According to the appellant:

" Voter No.	33	of Ext. A1 is No.	662	of Ext. A6;
,,	10,957	,,	998	,, A15;
,,	10,988	,,	1,033	,, A14;
,,	11,457	,,	10,34	,, A16;
,,	11,466	,,	1,082	,, A8;
,,	11,477	,,	1,031	,, A7;
,,	11,506	,,	1,774	,, A19;
,,	11,675	,,	1,092	,, A9;
,,	11,676	,,	1,008	,, A10;
,,	11,677	,,	1,176	,, A11;
,,	11,680	,,	1,045	,, A12;
,,	11,682	,,	1,089	,, A13;
,,	5,754	of Ext. A2 is No.	56/619	of Ext. A44;
,,	2,765	of Ext. A22 is No.	267	of Ext. A21;
,,	2,781	,,	600	,, A33;
,,	2,121	of Ext. A28 is No.	1,144	,, A30;
,,	2,144	,,	990	of Ext. A27;
,,	1,681	of Ext. A32 is No.	16/110	of Ext. A64;
,,	3,252	,,	4,864	,, A66;
,,	5,516	,,	26/127	,, A65;
,,	5,563	of Ext. A32 is No.	525	of Ext. A31;
,,	1,720	of Ext. A39 is No.	1,111	of Ext. A40; and
,,	5,762	of Ext. A42 is No.	1,958	of Ext. A41".

The Tribunal held that the identity has been established only in respect of 12 of these 23 votes, namely,

Voter Nos. 33, 10957, 11466, 11506, 11675, 11677 of Ext. A1;
Voter No. 5754 of Ext. A2,
Voter No. 2765 of Ext. A22;
Voter Nos. 1681, 3252 and 5563 of Ext. A32, and
Voter No. 1720 of Ext. A39.

and that it has not been established in respect of the other 11 voters namely,

Voter Nos. 10988, 11457, 11477, 11676, 11680, 11682 of Ext. A1
Voter No. 2781 of Ext. A22;
Voter Nos. 2121 and 2144 of Ext. A28;
Voter No. 5516 of Ext. A32, and
Voter No. 5762 of Ext. A42.

11. The oral evidence on which reliance is placed to establish the identity in respect of these 11 voters consists of the testimony of 8 witnesses, viz., P. Ws. 6, 12, 14, 20, 21, 50, 51 and 60. Of these

P. W. 6 is relied upon to establish the identity in respect of Voter No. 2781 of Ext. A22, P. W. 14 to establish the identity in respect of Voter No. 2121 and 2144 of Ext. A28, P. Ws. 20 and 21 to establish the identity in respect of Voter No. 5762 of Ext. A42 and P. Ws 50 and 51 to establish the identity in respect of Voter No. 5516 of Ext. A32.

12. We have been taken through the entire evidence in respect of the 11 voters mentioned above and must say that we see no reason to hold that the conclusion reached by the Tribunal is in any way incorrect. No useful purpose will be served by discussing that evidence in this judgment, especially in view of our conclusion that even if the identity of all the 23 voters has been established it is impossible to find that any of them except Voter No. 33 of Ext. A1 (P. W. 2) and Voter No. 2765 of Ext. A22 (P. W. 11) mentioned in paragraph 9 above were minors on the relevant date.

13. The Electoral Rolls are prepared in accordance with the Representation of the People Act (Preparation of Electoral Rolls) Rules, 1956. Those rules contain detailed provisions to ensure the correctness of the rules and the only evidence adduced to displace the presumption in their favour under section 114 of the Indian Evidence Act, 1872, consists of the entries in the Admission Registers.

14. As far as these Admission Registers are concerned the only attempt of the petitioner has been to bring them under section 35 of the Indian Evidence Act, 1872;

> "An entry in any public or other official book, register, or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept is itself a revelant fact".

It is common ground that the schools concerned are private schools and that the entries cannot be considered as entries made by a "public servant in the discharge of his official duty". The contention is that the latter portion of section 35 is attracted and that the entries should be considered as made "in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept.

15. The only provision which is contended to be a "law" enjoining the keeping of the Admission Registers is G. O. No. 1903, Education, dated the 21st August, 1939, and published on pp. 556-568 of Part I-B of the Fort St. George Gazette dated 29th August, 1939. The G. O. consists of two chapters and thirteen appendices. Chapter 1 consisting of 29 rules is entitled "Rules for Recogintion" and Chapter II consisting of 26 rules is entitled "Rules for Aid". Rule 21 of Chapter 1 deals with the registers to be kept and the relevant portion of that rule reads as follows: —

"The following registers shall be kept in the prescribed form and produced to the inspecting officer when required:—

(1) A register of admissions and withdrawals (Appendix 3)".

Of the 17 columns prescribed for the register of admissions and withdrawals in Appendix 3, column 8 is headed "Date of birth".

16. The submission is that these rules should be considered as rules framed in exercise of the powers conferred by section 56 of the Madras Elementary Education Act, 1920. Sub-section (1) of section 56 provides:

"The State Government may, after previous publication, made rules not inconsistent with this Act to carry out all or any of the purposes of this Act".

and it is agreed that as far as these rules are concerned there has been no "previous publication". It has also to be noted that the G. O. does not give any indication that the rules were framed in the exercise of any statutory power by the Government of Madras. In these circumstances, it is impossible to say that these rules are statutory rules and thus "law" within the meaning of section 35 of the Indian Evidence Act, 1872.

17. It is true that there is a set of rules framed under Section 56 of the Madras Elementary Education Act, 1920. Those rules appear on pp. 146-178 of Part I-B of the Fort St. George Gazette dated the 21st February 1922. It is specifically stated that those rules are made under section 56 of the Madras Elementary Education Act, 1920, and it is agreed that both these rules and the amendments to which we shall presently refer were made after "previous publication". Rule 9 of those rules under the heading

"section 41 (2)—rules for Recognition".

provided for the keeping of six registers, the first being "A register of admissions and withdrawals (Appendix 14)". Of the 17 columns prescribed in Appendix 14 for the register of admissions and withdrawals, column 8 was headed "Date of birth". These provisions, however, were omitted by the amendments to the rules published on p. 569 of Part I-B of the Fort St. George Gazette dated the 29th August 1939, and the rules of 1922 have naturally not been pressed into service.

18. It follows that the Admission Registers on which reliance is placed are not kept "in performance of a duty specially enjoined by the law of the country", that section 35 of the Indian Evidence Act, 1872, is unavailable and that on the evidence on record it is not possible to say that the minority of any of the 23 voters other than the two voters mentioned in paragraph 9 above has been established.

Contention No. 2.

19. Section 56 of the Representation of the People Act, 1951 provides:

> "The Election Commission shall fix the hours during which the poll will be taken; and the hours so fixed shall be published in such manner as may be prescribed:
>
> Provided that the total period allotted on any one day for polling at an election in a constituency shall not be less than eight hours";

and Rule 22 (2) of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1956:

> "The Presiding Officer shall close the polling station at the hour fixed in that behalf under section 56 and shall not admit thereto any elector after that hour:
>
> Provided that all electors present at the polling station before it is closed shall be entitled to cast their votes".

20. It is common ground that the hours fixed and published were from 7-30 a. m. to 4-30 p. m. with an interval of thirty minutes, and that the total period allotted for polling was 8½ hours. It is also agreed that polling as a matter of fact commenced at the two stations concerned—Nos. 78 and 79—only at 8·45 A. M. that those stations were closed at 5·10 P. M. and that excluding the interval of thirty minutes, the total time provided was only 7 hours and 55 minutes. There is a slight discrepancy between Ext. A 68, the diary of the Presiding Officer of polling station No. 79 and Ext. A71, the diary of the Presiding Officer of polling station No. 78, but in view of the agreement mentioned above, it is unnecessary to discuss that discrepancy and the minor variations in the oral testimony on the point and they are not discussed in this judgment.

21. The petitioner's case based on the reduction in polling time is stated as follows in paragraph 2 (b) of the petition:

> The polling was in the St. Michael's Anglo Indian School Burnasseri, where there were two booths. The poll there was not open for 8½ hours as had been notified. It was not open even for the statutory minimum of eight hours. Poll could start only by about 9 A. M. since the Presiding Officer had some trouble with the materials supplied. Large number of voters, about one hundred in number, went away in disgust without casting their votes because of this. They were all voters who had come to vote for the petitioner. The Presiding Officer assured the petitioner's agents, that to make up for the time lost, the poll will close only at about 6 P. M. and not at 4·30 P. M. as had been notified. As 4·30 P. M. there

were about one hundred voters who were still waiting to vote, persons who had been canvassed by the petitioner's workers on the hope and belief that poll would last for 8½ hours. There was stoppage of poll for half an hour at noon. To get 8½ hours polling time, the poll should have continued till 6 P. M. When it was 4.30 P. M. the agents of the respondents raised arguments that the poll should close and more voters should not be allowed to vote. There were no voters for the respondents who had not voted by that time and they could not hope to get more voters. One voter Soudamini by name was already in the booth for women. (The booth Nos. were 78 and 79 and one of them was for women). Even this the voter was not given a ballot paper. In the meanwhile, an agent or worker of the 1st respondent had given information to the Returning Officer who suddenly came to the booth and ordered that the poll should stop. The result of all this was that more than a hundred voters who would have voted for the petitioner could not exercise their votes because of the curtailment of voting time to about 7 hours. Petitioner has been greatly prejudiced in the election by this irregularity".

The issue framed on the subject is issue No. 3:

"Whether the period during which polling was actually allowed was below the minimum of 8 hours fixed under S. 56 and if so whether it has materially affected the result of the election".

22. The allegation that the polling was closed at the instance of an agent or worker of the 1st respondent does not find any support in the evidence adduced and no argument was addressed on the basis of that allegation. It is also clear that the hours of commencement and closing mentioned in the petition are incorrect. These, however, may not be of any material significance when, as pointed out by the Tribunal, it is noticed that the real complaint of the petitioner is that the polling time allowed was less than what was fixed and published and also the minimum prescribed by section 56 of the Representation of the People Act, 1951.

23. The main evidence on the basis of which we have to evaluate the contention that the petitioner lost more than 100 votes consists of the testimony of 16 witnesses, namely, P. Ws. 62 to 76 and T. W. 1. of these, P. W. 62 was the Presiding Officer of polling station No. 79 (for women), P. W. 65, the Assistant Presiding Officer of polling station No. 78 (for men) T. W. 1, the Returning Officer. P. Ws. 63, 64, 66 and 67 were election agents of the petitioner, P. W. 75 were his workers and P. Ws. 68 and 69 were election agents of the 2nd respondent. P. Ws. 70 to 74 are voters who state that they were unable to cast their votes because of the closure of the polling station earlier than expected.

24. P. W. 62 (Mrs. Young), the Presiding Officer of polling station No. 79, says:

> "The polling ought to have commenced at 7.30 A. M. according to rules. But it was commenced in my booth only at 8.45 A. M. The delay was due to the fact that the indelible ink did not act. So I proceeded to the Taluk Office and got another supply of ink. The time at which voting was commenced and the reason for the delay are recorded in my diary. The agents of all the contesting condidates were present in the booth before 7.30 A. M. Some voters had gathered outside the booth and they were standing in a queue by 7.30 A. M. I assured the polling agents that the time lost by the delay would be made up by extending the time in the evening. There was a lunch interval at noon. If I had started at 7.30 A. M. I should have closed polling at 4.30 P. M. So to make up the time lost by delay in commencing the poll, I extended polling even after 4.30 P. M. The Returning Officer came to my booth and asked me to stop polling at 5.10 P. M. and I stopped immediately".

In cross-examination the witness appears to have been specifically asked whether any voters went away in the morning as a result of the late commencement of the poll. Her answer is:

> "When I left the booth for ink, I told the agents of the candidate the purpose of my departure and also that I would be back in a short time. When I came back the queue of the voters were still there. Nobody represented to me that anybody who had come there had to go back without recording their votes on account of the late commencement of the voting. Nobody protested to the starting of voting at 8.45 A. M."

About the evening incident her statement is :

> "Since there were no voters about the place the Returning Officer insisted that I should stop";

and :

> "The Returning Officer asked me whether any voters had come there after 4.30 P. M. I said no one came. He then asked me to close voting. This conversation took place in my room in the presence and hearing of the agents. When I told the Returning Officer that nobody had come there to vote after 4.30 and when the Returning Officer asked me to stop voting nobody said anything against it. At that moment no one brought to the notice of either myself or the Returning Officer that any voter who had to be given a chance for voting was actually present there".

25. T. W. 1. the Returning Officer, speaks of the closing of the poll as follows:

> "On the day of poll I visited these stations at 5.10 or 5.15 P. M., and not earlier. When I visited the polling stations there were no voters anywhere in the neighbourhood. Actually it gave a deserted appearance altogether. When I asked the Presiding Officer in Polling Station No. 79 why she did not make arrangement for closing the poll she said there was some delay in commencing polls. I said that it did not matter as long as there were no voters to vote and I asked her to close";

and :

> "Nobody protested to the closing of poll but on the other hand everybody appeared to be relieved. I directed closure in the presence of agents. Nobody told me that any voter was present or he or she should be permitted to vote".

26. After a careful and detailed discussion of the entire evidence adduced before the Tribunal in paragraphs 12 to 25 of its order, the Tribunal reached the conclusion that :

> "the late commencement of poll or stopping of poll at 5.10 or 5.15 has not materially affected the result of the election".

The whole ground was covered afresh before us and counsel for the appellant took us through the whole of the evidence of the witnesses mentioned in paragraph 23 above and portions of the evidence of R. Ws. 2 to 7 and 9. We must confess, however, that we see no reason whatsoever to differ from the conclusion reached by the Tribunal.

27. No witness has sworn to the effect that he or she went to the polling station in the morning but returned as a result of the delay that occurred and did not go back and vote thereafter. P. Ws. 70 to 74 as already indicated are the only witnesses who say that they were precluded from voting as a result of the closing of the polling stations earlier than expected. The rest of the evidence is neither specific nor definite and the maximum that can be inferred therefrom is that there were groups of people collected here and there, a phenomenon which cannot be considered as anything unusual or significant at the close of an election day.

28. P. W. 70 is voter No. 1017 of Ext. A69. She says "ഞാൻ vote ചെയ്യാൻ കാലത്തെ പോയിരുന്നു. കുറച്ചു താമസം ഉണ്ടെന്നു പറഞ്ഞു. അതുകൊണ്ട് വീട്ടിലേക്ക് മടങ്ങിപ്പോയി. കാലത്തു താമസിച്ചതു കൊണ്ട് വൈകുന്നേരം നീട്ടികിട്ടുമെന്ന് എല്ലാവരും പറഞ്ഞു. അതുകൊണ്ട് ഞാൻ കുറെ താമസിച്ചാണ് ചെന്നത്. ഞാൻ polling booth-ൽ ചെന്നു. എന്നെ vote ചെയ്യുവാൻ സമ്മതിച്ചില്ല. പൂട്ടിപ്പോയി എന്നു പറഞ്ഞു."

The testimony of Mrs. Young (P. W. 62) regarding this witness is :

> "As soon as I stopped polling a voter came there for casting vote. I would not allow her to vote. That was voter No. 1017. The roll is marked Ext. A69";

and :

> "No one except this voter came there for voting at any time after 4.30 p. m. and before the closing of the first box and this voter came there after the first box was closed. Nobody told me that there was anybody other than this voter waiting there to cast votes".

Ext. A70 is a statement obtained from Mrs. Young in respect of P. W70.

It reads as follows:—

> "The Returning Officer for polling station No. 79 directed me to stop the polling when he entered the polling station at 5.10 p. m. I had explained to him that I started the polling at 8.45 a. m. due to the trouble I had with indelible ink. In spite of that he insisted that I should stop. Accordingly I stopped and closed the 1st box of the Assembly side when a voter with the serial No. 1017 came in. I was unable to allow her to vote".

29. If there were other voters who turned up at or about the time the polling stations were closed the chances are that similar statements would have been obtained in their cases as well. In the absence of such statements, and in view of the testimony of Mrs. Young (P. W. 62) that there were no such voters present and of T. W. 1 that when he visited the place there were no voters anywhere in the neighbourhood and that it presented a deserted appearance, we can only conclude that the closing of the polling stations earlier than expected did not materially affect the result of the election. Even assuming that P. Ws. 71 to 74 were also precluded from voting by the closing of the polling stations earlier than expected and that if they were allowed to vote they would have voted for the petitioner it is impossible to say that the result of the election has been materiallay affected by the absence of their votes.

30. Ext. A79 is the Final Result Sheet signed by the Returning Officer. It shows that 429 votes were cast in polling station No. 78 and 501 votes were cast in polling station No. 79, thus making a total number of 930 votes. The Tribunal after making certain deductions for dead and absentee voters estimated—We think quite correctly the voters available in the constituency as 1272. The estimate of R. W. 9 is lower, namely, 1160. Whichever figure is accepted there can be no doubt that there were sufficient number of voters who if they were so minded

could have bridged the difference of 51 between the number of votes obtained by the petitioner and the 1st respondent. What stands in the way of the petitioner's success is not the non-availability of a sufficient number of voters who had not voted at the election but the fact that their non-voting cannot be traced to any non-compliance with the provisions of the Constitution or the Representation of the People Act, 1951, or of any rules or order made under that Act.

31. In these circumstances contention No. 2 cannot be sustained and has to be negatived.

32. We would like to make it clear that nothing we have stated should be taken as an expression of opinion that the extension of time promised by Mrs. Young (P. W. 62) was warranted by any of the provisions of law bearing on the subject.

Contention No. 3.

33. Rule 44 of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1956, provides:

"(1) A presiding officer, a polling officer, any other public servant or a polling agent, who is an elector in a constituency and is by reason of his being on duty at a polling station unable to vote at the polling station where he is entitled to do so may on application be allowed to record his vote in that constituency by postal ballot.

(2) Every such application shall be addressed to the Returning Officer of the constituency, shall specify the name of the elector, his address and his electoral roll number and shall be made at least seven days or such less period as the Returning Officer may in any particular case allow, before the date or the first of the dates fixed for the poll.

(3) If the Returning Officer is satisfied that the applicant is entitled to vote by postal ballot under sub-rule (1) he shall make arrangements for the supply of a postal ballot paper to him".

and the contention before us is that 23 votes have been lost to the petitioner as a result of the non-issue of postal ballot papers by the Returning Officer to:—

P. Ws. 23, 24, 25, 27, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 47, 49, 77 and 79.

of these witnesses the applications of only 17 are available, of:

P. Ws. 23, 24, 25, 27, 29, 30, 31, 33, 34, 37, 38, 42, 43, 44, 47, 49 and 79.

Their applications are:

Exts: A45, A46, A47, A48, A49, A50, A52, A53, A54, A55, A56, A57, A58, A59, A60, A63, and A75.

respectively. Ext. A55 was rejected on 27-2-1957; Exts. A46, A52, A54 and A56 were rejected on 28-2-1957; Exts. A45, A48, A49, A50, A53, A58, A59 and A63 were rejected on 1-3-1957;

Ext. A60 was rejected on 2-3-1957; and Ext. A57 was rejected on 3-3-1957. All these 15 applications bear the endorsement "too late", the initials of the Returning Officer and the date of rejection. Ext. A73 contains the endorsement "Too late" but not the initials or the date of rejection. Ext. A47 contains neither an endorsement, nor any initials or date.

34. P. W. 48 was examined to prove that he sent the applications of P. Ws. 32, 35 and 77 by registered post. The postal receipt produced by him is Ext. A62 dated 25-2-1957. The address given in Ext. A62 is

"The Returning Officer,
Tellicherry".

Counsel for the respondent pointed out that the letter should have been addressed

"The Returning Officer,
Cannanore Assembly Constituency No. 1,
Tellicherry".

as there was another Returning Officer at Tellicherry, namely, of the Tellicherry Constituency, and the letter might very well have been delivered to him instead of to T. W. 1. We see considerable force in this submission.

35. P. Ws. 39, 40 and 41 swear that they entrusted their applications to a servant of theirs, Sebastian, by name. This Sebastian has not been examined and it is difficult to say what exactly he did with the applications. Ext. A77 is the register kept by the Returning Officer of the applications for postal ballot papers received by him. The Returning Officer, Tribunal Witness No.1, has stated :

"A 77 is maintained to show to whom postal ballot papers have been issued. The register was opened at the time of the issue of ballot papers. All applications for which postal ballot papers were issued are entered in Ext. A 77. As and when the applications were received the postal ballot papers were issued".

Ext. A 77 shows that the names of P. Ws. 39, 40 and 41 were entered and then struck off. If their applications were not received, it is curious how their names came to be entered in the register. No question regarding this, however, was put to the Returning Officer (T. W. 1) and in the absence of his explanation a positive conclusion is impossible and we can only proceed on the assumption that their applications were not received by him.

36. There is no reliable evidence as to when any of the 17 applications were posted and we see no reason to disbelieve the evidence of the Returning Officer when he says that he dealt with all applications as and when they were received and that these applications were rejected because they were not received within time.

37. Under Sub-rule (2) of rule 44 of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1956, the Returning Officer has certainly got a discretion to supply postal ballot papers even in cases where the applications were made less than seven days "before the date or the first of the dates fixed for the poll". But if he chooses not to exercise that discretion in favour of the applicants we cannot possibly say that he should have done so or that his refusal to do so contravenes the statutory provisions on the subject.

Contention No. 4.

38. According to section 100 (1) (d) (ii) of the Representation of the People Act, 1951, the Tribunal shall declare the election of the returned candidates to be void if the result of the election in so far as it concerns the said candidate has been materially affected—

> "by any corrupt practice committed in the interests of the returned candidate by a person other than that candidate or his election agent or a person acting with the consent of such candidate or election agent".

The contention is that the petitioner lost 8 votes as a result of obstruction by the Communists.

39. The 8 votes alleged to have been lost are those of P.W. 80, of her daughter Vanitha who has not been examined, of P. Ws. 81, 82 and 84 and of 3 women voters mentioned by P. W. 83. The only evidence to substantiate the contention consists of the testimony of P. Ws. 80 to 84 and of the petitioner (P. W. 85) who claims no direct knowledge of the incidents alleged. P. W. 80, 81, 82 and 84 are voters and P. W. 83 is a taxi driver.

40. P. W. 80 is voter No. 902 of Exhibit A 74, P. Ws. 81 and 82 are voter Nos. 944 and 819 respectively of Exhibit A 75 and P. W. 84 is voter No. 1514 of Exhibit A 67.

41. All these witnesses were travelling in motor cars at the time of the obstruction but none of them is able to give any particulars of the vehicles or their drivers. They also admit that they do not know the name of any one of the obstructors or any other person present, that they are not in a position to identify any one of them, and that none of them made any complaint to the police.

42. P. W. 83 states that when he was driving his taxi with 3 women voters there was an obstruction, that he took the women voters back to their homes and that he orally complained to the police officers about the matter. He is unable to give the names of the 3 women voters or to specify their houses. No police officer has been examined in this case.

43. In these circumstances we feel no doubt that the Tribunal was right when it said :

> "I do not think that I will be justified in entering a finding in favour of the petitioner under this issue on this doubtful material".

Even assuming that the 8 voters were as a matter of fact obstructed by the Communists and that but for the obstruction they would have voted for the petitioner, it is impossible to say that the result of the election has been materially affected by the loss of their votes in view of our conclusions on contention Nos. 1, 2 and 3.

Contention No. 5.

44. A declaration to the effect that the election of the returned candidate is void can be made only if the result of the election has been materially affected. In A. I. R. 1954 S. C. 513 the words "the result of the election has been materially affected" came up for consideration.

The court said:

> "These words have been the subject of much controversy before the Election Tribunals and it is agreed that the opinions expressed have not always been uniform or consistent. These words seem to us to indicate that the result should not be judged by the mere increase or decrease in the total number of votes secured by the returned candidate but by proof of the fact that the wasted votes would have been distributed in such a manner between the contesting candidates as would have brought about the defeat of the returned candidate".

that the burden of proof is on the person who seeks to have an election set aside, and that if the petitioner is unable to adduce the necessary evidence:

> "The only inescapable conclusion to which the Tribunal can come is that the burden is not discharged and that the election must stand".

This decision was cited with approval in A. I. R. 1955 S. C. 233.

45. A. I. R. 1954 S. C. 513 was decided on the assumption that there was an improper acceptance of nominations. The decision was also mentioned without dissent in A. I. R. 1957 S. C. 242, a case of an improper rejection of a nomination. The provision concerned in both the cases was section 100 (1) (c) which provided that if the Tribunal was of opinion that the result of the election had been materially affected by the improper acceptance or rejection of any nomination, the Tribunal shall declare the election to be wholly void. The court said:

> "It appears that though the words of the section are in general terms with equal application to the case of improper acceptance, as also of improper rejection of a nomination paper, case law has made a distinction between the two classes of cases. So far as the latter class of cases is concerned, it may be pointed out that almost all the Election Tribunals in the country have consistently taken the view that there is a presumption in the case of improper

rejection of a nomination paper that it has materially affected the result of the election. Apart from the practical difficulty, almost the impossibility of demonstrating that the electors would have cast their votes in a particular way, that is to say, that a substantial number of them would have cast their votes in favour of the rejected candidate, the fact that one of several candidates for an election had been kept out of the arena is by itself a very material consideration. Cases can easily be imagined where the most desirable candidate from the point of view of electors and the most formidable candidate from the point of view of the other candidates may have been wrongly kept out from seeking election. By keeping out such a desirable candidate, the officer rejecting the nomination paper may have prevented the electors from voting for the best candidate available. On the other hand in the case of an improper acceptance of a nomination paper, proof may easily be forthcoming to demonstrate that the coming into the arena of an additional candidate has not had any effect on the election of the best candidate in the field. The conjecture therefore is permissible that the legislature realising the difference between the two classes of cases has given legislative sanction to the view by amending S. 100 by the Representation of the People (Second Amendment) Act, 27 of 1956, and by going to the length of providing that an improper rejection of any nomination paper is conclusive proof of the election being void";

and upheld the majority decision of the Election Tribunal of Patiala.

46. The difference between the votes secured by the petitioner and the 1st respondent is 51 (petitioner 17, 413 votes; 1st respondent: 17, 464 votes) and in the light of our conclusions on contention Nos. 1 to 4 it is impossible to hold that the result of the election has been materially affected by the incidents specified in paragraph 7 above.

47. It follows that the conclusion reached by the Tribunal is correct and that this appeal has to be dismissed. Judgment accordingly.

48. The petitioner will pay the costs of the 1st respondent, Advocate's fee Rs. 500.

28-3-1958.

(Sd.) K. T. Koshi, C. J.,
(Sd.) M. S. Menon, J.

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